Office Supreme Court, U.S.
FILED
SEP 20 1955
HAROLD B. WILLEY, Clerk

No. 36

In the Supreme Court of the United States

OCTOBER TERM, 1955

CLIFTON ALTON PORET AND EDGAR LABAT,
PETITIONERS

v.

STATE OF LOUISIANA

On Writ of Certiorari to the Supreme Court of the State of Louisiana.

Brief on Behalf of the State of Louisiana.

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STATEMENT OF ISSUES

May it please the Court:

The facts of this case are succinctly stated by the Supreme Court of Louisiana in the opinion which is reproduced at pages 24-34 of the record. As the opinion well illustrates, the State's case against petitioner on its merits was very strong.

In fact, the State produced the direct testimony of two eye-witnesses to the crime who positively and definitely identified both defendants, plus strong corroborative evidence. This is, thus, not a situation where constitutional rights were violated to strengthen a weak case.

On December 11, 1950, petitioners, both Negroes, were indicted for aggravated rape by the Grand Jury for the Parish of Orleans, which was empaneled to serve from September 5, 1950 to March 5, 1951. (R. 1, 12).

On January 5, 1951, two months before the grand jury term ended, the Court appointed E. I. Mahoney, Esq., as counsel to represent petitioner Labat. (R. 1). On January 29, 1952, Mr. Mahoney withdrew as counsel for Labat, who was then represented by his own attorney. (R. 1, 36).

On November 7, 1952, one year and eight months after the grand jury term ended, Labat filed a motion to quash the indictment on the ground that he was deprived of due process and of equal protection of the laws because there had been systematic exclusion of Negroes from the Grand Jury which indicted him. (R. 3).

Petitioner Poret fled almost immediately after the commission of the rape. Diligent and sustained efforts on the part of the New Orleans Police Department and the office of the Criminal Sheriff to arrest Poret were fruitless. (R. 24, 28, 37-40, 45).

More than seven months after the expiration of the term of the Grand Jury which indicted him, it was learned that Poret was confined in the Tennessee State Penitentiary. (R. 38-40). Every effort was made to have Poret returned to Louisiana for trial. (R. 40-44). In October, 1952, he was returned to Louisiana upon his release by Tennessee. (R. 38, 40).

On October 27, 1952, petitioner Poret, represented by counsel, was arraigned. (R. 2). On November 7, 1952, he filed a motion to quash the indictment on the same ground urged by Labat. (R. 3).

The State filed an answer and demurrer to the motion to quash filed by both defendants on the ground that they had not been filed within the time limit established for filing such pleas by Louisiana law. (R. 10, 12, 22). The trial court sustained the demurrer as to both defendants (R. 5), and this ruling was affirmed by the Supreme Court of Louisiana. (R. 26-29).

It is important to note at this point that the only matter at issue and passed upon by the Louisiana Courts was whether petitioners' motions to quash were filed timely. The Louisiana courts did not and could not as the issues were presented, pass upon the question of whether there had been in fact systematic exclusion of Negroes from the grand jury. That question was never before the

Louisiana Courts, and it is not now before this Court.

Thus, the only issue before this Court is whether the Louisiana procedural statute which requires a motion to quash an indictment on the ground of the illegality of a grand jury to be filed within a definite time limitation violates any federal constitutional rights of petitioners.

ARGUMENT

I.

The Louisiana law which provides a time limitation for filing objections to the manner of selecting a grand jury does not violate any federal constitutional provision. La. Rev. Stat. 15:202 and the Wilson case.

In 1928 Louisiana adopted a comprehensive Code of Criminal Procedure. This Code was reenacted verbatim by the Legislature of Louisiana in 1950 in a general revision of the Louisiana statutes. The 1928 Code became Title 15 of the Louisiana Revised Statutes of 1950. Article 202 of this Code (or R.S. 15:202) provides as follows:

> "§ 202. TIME FOR URGING OBJECTIONS TO ARRAY: WAIVER
>
> All objections to the manner of selecting or drawing any juror or jury or to any defect or irregularity that can be pleaded against

> any array or venire must be filed, pleaded, heard or urged before the expiration of the third judicial day of the term for which said jury shall have been drawn, or before entering upon the trial of the case if it be begun sooner; otherwise, all such objections shall be considered as waived and shall not afterwards be urged or heard."

It should be noted that while this section does not specifically refer to grand juries, it is contained in a Part of the Code entitled "Grand and Petit Juries". It is thus clear that Article 202 by inclusion in a Part so entitled, deals with both grand and petit juries. As will be seen hereafter, this has always been the interpretation placed upon it by the courts of Louisiana.

In 1943, the Supreme Court of Louisiana, in a case identical in every respect with the instant case, interpreted Article 202 to mean that an accused could file attacks upon the grand jury only until the third judicial day after the *end* of the grand jury term. *State v. Wilson*, 204 La. 24, 14 S. (2d) 873 (1943).

In the instant case, the motions to quash were not filed until November 7, 1952, a year and eight months after the end of the grand jury term. Thus it is clear that petitioners filed their pleadings too late, and the Supreme Court of Louisiana so held, affirming the *Wilson* case.

Before discussing the constitutional validity of

the *Wilson* doctrine, which was affirmed and applied in the instant case by the Louisiana courts, it is well to note a few matters about the *Wilson* case.

1. The Supreme Court of Louisiana in the *Wilson* case clearly recognized that Article 202 as applicable to grand juries should be interpreted to allow an accused three days after the *end* of the grand jury term, because if the time limitation should be interpreted to mean three days after the *beginning* of the six months term of the grand jury no opportunity to make an attack upon the grand jury would be afforded those persons who were indicted after these three days had elapsed. Thus the Supreme Court of Louisiana recognized the principle that a defendant is entitled to a reasonable time within which to raise federal constitutional questions, and interpreted Article 202 so as to provide such a period.

2. The Supreme Court of the United States granted an appeal in the *Wilson* case, but *thereafter dismissed the appeal in a per curiam reading as follows:*

> "The motion to dismiss is granted and the appeal is dismissed, it appearing that the decision is based upon a non-federal ground adequate to support it." See *Wilson v. Louisiana*, 320 U.S. 714, 64 S.Ct. 257, 88 L.Ed. 419 (1943).

Thus, this Court has already passed upon the

precise issue involved in this case, and has approved the *Wilson* doctrine. Acting under the *Wilson* decision as approved by this Court, the Louisiana Supreme Court held that the motions to quash in the instant case was filed too late. Under the rule announced by the United States Supreme Court in the *Wilson* case, the decision of the Louisiana Supreme Court in the instant case should be affirmed, being "based upon a non-federal ground adequate to support it". The United States Supreme Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with state law. *Edelman v. California*, 344 U.S. 357, 73 Sup. Ct. 293, 97 L.Ed. 387 (1953).

II.

Federal Courts, as a general rule, must accept the interpretation placed upon state statutes by state courts.

It is a well-established principle that federal courts must accept the meaning and interpretation placed on a state statute by state courts. The United States Supreme Court has always insisted that state courts be permitted to decide questions of state law, and has even had federal courts decline jurisdiction to awaiting a ruling from a state court. Cf. *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 Sup. Ct. 1098, 87 L.Ed. 1424 (1943); *Williams*

v. Kaiser, 323 U.S. 471; 65 Sup. Ct. 363, 89 L.Ed. 398 (1945).

This doctrine does not prevent the Supreme Court of the United States from determining whether the statute *as so interpreted*, violates a federal constitutional privilege. But it does mean that the Supreme Court of the United States will not undertake to place an interpretation upon a state statute different from that given it by the state courts, even though it might not agree with the interpretation. It has been recognized that the only instance in which this general rule will not be applied is where the circumstances give rise to an inference that the state court is guilty of an "evasion"—an interpretation of state law with the specific intent to deprive a litigant of a federal rights. See *Williams v. Georgia*, 349 U.S. 375 at 399, 75 Sup. Ct. 814, 99 L.Ed. advance p. 703 (1955).

III.

The Wilson doctrine is not an "evasion" to deprive petitioner of a federal right.

Petitioners argue that the *Wilson* doctrine is a prohibited "evasion" within the intendment of the rule stated above. This is based on the theory that Article 202 does not mean what the Supreme Court of Louisiana says it means. It should be remembered that the *Wilson* doctrine was not developed for the instant case but has been the law of Loui-

siana since the *Wilson* decision was approved by this Court thirteen years ago. The Supreme Court of Louisiana adhered to its prior interpretation of Article 202 in this case and its companion case, *State v. Michel*, and also in a later case, *State v. Chianelli*, 226 La. 552, 76 S. (2d) 727 (1954).

It is significant also, as pointed out by the Louisiana Supreme Court in its opinion in *State v. Michel*, that the Louisiana Legislature has met many times since the *Wilson* doctrine was enunciated. Not only has the Legislature not changed the *Wilson* doctrine, but it has approved it by reenacting Article 202 of the Criminal Code without change in 1950 as Section 202 of Title 15 of the Louisiana Revised Statutes. See *State v. Michel*, 225 La. 1040, 74 So. (2d) 207 (1954).

It is clear from the reasoning of the opinion in the *Wilson* case that the Court was not attempting to "evade". In fact quite the contrary is evident. The Louisiana Supreme Court in the *Wilson* case interpreted Article 202 in the most liberal manner possible, permitting a defendant to attack the grand jury until three days after the *end* of the grand jury term instead of three days after the *beginning* thereof. The effect of the decision is to give a defendant more time, not less time, to raise federal questions. In fact, the meticulous concern of the Louisiana Supreme Court for the protection of federal rights is the central theme of the de-

cision. For example, the following language from the opinion in *Wilson* on rehearing is significant:

> ". . . Obviously, under the construction requiring the filing of the motion to quash within three judicial days after the Grand Jury is drawn, the defendant would not be afforded an opportunity, through proper pleadings, to challenge the legality of the drawing and selecting of the jury, the array or venire. Therefore, this Court, by giving Article 202 such construction would unquestionably make its provisions unconstitutional under our State and Federal Constitutions because of a denial of due process of law.
>
> "While the constitutionality of Article 202 of the Code of Criminal Procedure is not attacked in this case, it is clear that its provisions apply to all persons charged with crime regardless of color, race, or previous condition of servitude and, therefore, it does not conflict with the provisions of the articles of the State and Federal Constitutions guaranteeing persons the equal protection of the law. Neither does the construction which we have placed upon its provisions in the majority opinion deny to any person charged with violating a criminal law, the equal protection of the law because of race, color, or previous condition of servitude. The interpretation which we have placed upon the statute is in keeping with our previous holdings, in cases where persons of the white race were tried for

criminal offenses and failed to comply with the provisions of Article 202 of the Code of Criminal Procedure in attacking the legality of the drawing and selecting of the Grand Jury, that the plea came too late and would not be considered." *State v. Wilson*, 204 La. 24, at 75-76, 14 S. (2d) 873 (1943).

In *State v. Chianelli*, supra, decided after the instant case, this concern about federal rights was again expressed by the Supreme Court of Louisiana in these words:

> "We are conscious of the fact that under the interpretation given to Article 202 by the Wilson case and others following it an accused can indefinitely delay the trial of his case by waiting until the date fixed for trial to object to the petit jury array or venire. However, to avoid these unnecessary delays Article 202 of the Code of Criminal Procedure requires legislative, not judicial, action; but the Legislature in amending this article should be careful not to incorporate in it any provision that would subject the statute to an attack on the ground of denial of due process of law." *State v. Chianelli*, 226 La. 552, at 559-560, 76 S. (2d) 727 (1954).

Furthermore, an analysis of the cases on the subject of "evasion" reveals situations so strained as to amount practically to bad faith on the part of state courts. Thus in *Rogers v. Alabama*, 192 U.S. 266, 24 Sup. Ct. 257, 48 L.Ed. 417 (1904), de-

fendant's motion to quash the indictment on the ground of systematic exclusion of Negroes was stricken by the trial court. The Supreme Court of Alabama affirmed the trial court's action under a statute which provided that the court could strike from the record pleadings which were unnecessarily prolix. The United States Supreme Court reversed the conviction, pointing out that the entire motion setting up a constitutional right was only two pages in length. Manifestly, there is absolutely no similarity between the action of the Alabama Supreme Court in *Rogers* and that of the Louisiana Supreme Court in *Wilson* and in the instant case.

As a matter of fact, it is submitted that "evasion" can be found only in the *application* of a state statute to a particular situation, as in *Rogers*, not in the *interpretation* of a statute as in *Wilson*, since an interpretation necessarily affects all litigants alike and applies in all cases, whether or not they involve federal rights.

Certainly it would be more than unjust to brand the concern of the Louisiana Supreme Court for the protection of federal rights which is manifest in its opinions in *Wilson* and in the subsequent cases involving Article 202 as an "evasion". So obvious is it that the *Wilson* decision does not involve an "evasion" that this Court dismissed the appeal in that case with a per curiam opinion.

IV.

R.S. 15:202 as interpreted in the Wilson case is a valid procedural statute which does not unreasonably interfere with the assertion of federal rights.

It is clear that there must be some time in the course of a criminal proceeding after which it will be too late to raise certain pleas. Otherwise, a defendant could wait until he is convicted before raising his objection, and thus get two or more trials instead of one. As Mr. Justice Clark said in his dissent in *Williams v. Georgia*, 349 U.S. 375 at 403, 75 Sup. Ct. 814, 99 L.Ed. advance p. 703 (1955):

> "A State may be influenced by the unfairness of allowing the litigant who remains silent two chances for acquittal while giving the diligent litigant only one.
>
> And orderly administration of the laws often imposes hardship upon those who have not properly preserved their rights."

Louisiana has decided that the proper limitation upon the filing of a plea attacking a grand jury is three days after the expiration of the term of the grand jury. This gives everyone at least three days, and in most instances more than three days, to attack the grand jury. The motion to quash is itself a simple document, and certainly no great amount of research or study is required to raise

the issue of systematic exclusion. See, for example, the simplicity of the very documents filed in this case. (R.9 & 19). Thus, little or no preparation or study was required by petitioners' counsel.

What is Louisiana's purpose in establishing this time limitation? The *Wilson* case gives two answers to this question:

1. "This Court, in the case of State v. Strickland, supra, in interpreting the provisions of Section 11 of Act No. 44 of 1877, and, in *State v. White*, supra, in applying the provisions of Article 202 of the Code of Criminal Procedure, pointed out that the Legislature intended to require an accused to file his objections and pleas to any defect or irregularity in the drawing or the selecting of a juror or jury or venire or array within a certain period of time, in order to prevent the defendant from going to trial on the merits, and, in the event he were convicted, assure himself of another trial by withholding his pleas as to any error or irregularities in the drawing and selecting of the jury, venire and array. It is apparent that the Legislature took into consideration the fact that timeliness in filing such pleas was necessary to the effective and proper administration of justice by the State."

2. "Persons charged with offenses under indictments are usually not brought to trial for months and sometimes for years after

> the time when the members of the grand jury who returned them have gone out of office. The persons who composed the array from which the venires were drawn are very likely to be scattered over a wide area within a reasonable time after the grand jury term ends. If a defendant, under the law, were granted the right to raise this type of objection and file this character of pleading at any time before trial, it is easy to see that in innumerable instances the State would be put at serious disadvantage in making its proof and this would result in a great many guilty persons escaping justice. Apparently, our Legislature had this in mind because under Section 16 of Act No. 135 of 1898, the defendant was granted the right to file these types of objections and pleadings at any time before the beginning of the trial of the case. The members of the Legislature in 1928 changed that statute by placing into the Code of Criminal Procedure Article 202." *State v. Wilson*, 204 La. 24, at 47, 48, 14 S. (2d) 873 (1943).

Moreover, the state's requirement of an early raising of the plea gives the state a better opportunity to correct whatever errors might have been made.

Thus, it is submitted that the *Wilson* doctrine is not a sinister anti-federal doctrine. It is a reasonable, understandable, properly motivated doc-

trine, adopted for the purpose of fostering the orderly administration of justice. It is applicable not solely to Negroes, nor to motions to quash based upon federal rights. It applies to all persons and to all types of objections.

It is well settled that State procedural devices will be upheld by this Court if they provide a reasonable opportunity to raise federal questions. Thus, in *Parker v. Illinois*, 333 U.S. 571, 68 Sup. Ct. 708, 92 L. Ed. 886 (1948), this Court upheld an Illinois practice which established a waiver of federal questions where an appeal was taken to an intermediate appellate court rather than to the Illinois Supreme Court. The Court said:

> "When federal rights are involved, it is, of course, for this Court finally to determine whether the failure to follow the procedure designated by a State for their protection constitutes a waiver of them. *Davis v. O'Hara*, 266 U.S. 314; *Central Union Co. v. Edwardsville, supra.* The Court said in the *Edwardsville* case that when the waiver is founded on a failure to comply with the appellate practice of a State, the question turns on whether this practice gives litigants a reasonable opportunity to have the issue as to the claimed right heard and determined' by the state court. 269 U.S., pp. 194-195. (333 U.S. 571 at 574).

In *Bailey v. Commonwealth*, 193 Va. 814, 71 S. E. 2d 368 (1952), the Supreme Court of Virginia

affirmed the trial court's decision rejecting a motion attacking the grand jury on the ground of discrimination, holding that the attack was not timely. *This Court denied certiorari.* (344 U.S. 886, 73 Sup. Ct. 186, 97 L. Ed. 686, 1952).

Yakus v. United States, 321 U.S. 414, 64 Sup. Ct. 660, 88 L.Ed. 834 (1944), involved a federal statute somewhat similar to Article 202 of the Louisiana Code of Criminal Procedure. The Emergency Price Control Act of 1942 provided that the validity of a price regulation could not be attacked in a criminal proceeding for violation thereof unless a protest was filed with the Administrator within a sixty-day period. Defendant failed to file a protest timely and was convicted. In affirming the conviction the United States Supreme Court said:

> "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. *O'Neil v. Vermont*, 144 U.S. 323, 331; *Barbour v. Georgia*, 249 U.S. 454, 460; *Whitney v. California*, 274 U.S. 357, 360, 362, 380. Courts may for that reason refuse to consider a constitutional objection even though a like objection had previously been sustained in a case in which it was properly taken. *Seaboard Air Line Ry. Co. v. Watson*, 287 U.S. 86. While this Court in

its discretion sometimes departs from this rule in cases from lower federal courts, it invariably adheres to it in cases from state courts, see Brandeis, J. concurring in *Whitney v. California, supra*, 380, and it could hardly be maintained that it is beyond legislative power to make the rule inflexible in all cases. Compare *Woolsey v. Best*, 299 U.S.1 with *Ex parte Siebold*, 100 U.S. 371." (321 U.S. 414, 444-445).

The opinion in the *Yakus* case (Footnote 3, 321 U.S. at p. 435) cites a number of other federal cases in which limited periods for resort to administrative relief as a prerequisite to proceeding in court have been held to be sufficient. In *Bellingham Bay & B.C.R. Co. v. New Whatcom*, 172 U.S. 314, 19 Sup. Ct. 205, 43 L.Ed. 460 (1899), a ten day period for such action was held reasonable.

In view of the simplicity of the pleading required to urge the illegality of a grand jury, it cannot be seriously argued that a statute which always affords at least three days and often a much longer period is unreasonable. (Compare, *Avery v. Alabama*, 308 U.S. 444, 60 Sup. Ct. 321, 84 L.Ed. 377 (1940), in which the Supreme Court of the United States held that a delay of less than three days between the appointment of counsel and the *trial* in a capital case was a reasonable time.)

As this Court pointed out in *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 Sup. Ct. 330, 78 L.

Ed. 674 (1934), a state is "free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. . . . Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar." See *Stein v. N.Y.*, 346 U.S. 156, 73 Sup. Ct. 1077, 97 L.Ed. 1522 (1953), approving the *Snyder* decision.

It is submitted therefore that Article 202 as interpreted in the *Wilson* case establishes a sound and valid procedural step, and that it provides a reasonable opportunity for anyone—white or black—to raise any question, including the question of systematic exclusion, with respect to grand juries.

V.

The limitation provided by Article 202 runs against a defendant who is a fugitive.

Petitioner Poret contends that the limitation provided by Louisiana R.S. 15:202 (Article 202, Code of Criminal Procedure) has no application against him because he was not arrested until after the period within which he could attack the grand jury had expired. The record contains ample evidence that Poret was a fugitive from November 12, 1950, the day this crime was com-

mitted, until he was arrested in Tennessee nearly a year later. Constant efforts of the New Orleans Police Department and of the Criminal Sheriff's office to locate Poret began on the date of the crime and continued until notice was received in October 1951, that he was incarcerated in the Tennessee State Penitentiary. (R. 37-40, R. 45).

The term of the grand jury which indicted Poret ended on March 5, 1951. (R. 5). Thus, Poret had from December 11, 1950, the date he was indicted, until March 8, 1951, within which he could file an attack upon the grand jury. *During this entire period and for some time thereafter he was a fugitive from justice.*

The trial judge found as a fact that Poret was a fugitive from Justice (R. 24), and the Louisiana Supreme Court reached the same conclusion.

Poret contends that he was not informed of the indictment against him until after the period for attacking the grand jury had expired. The record leaves no room for doubt that he was well aware of the fact that he was being sought by the police for this crime and that he therefore fled. There is not even an attempt either in the record or in the brief filed on his behalf to explain Poret's sudden disappearance. Had Poret not unlawfully fled, he would have been arrested immediately and would have been duly informed of the indictment against him.

As the Louisiana Supreme Court pointed out, Poret cannot take advantage of his own flight to extend the period within which the grand jury which indicted him could have been attacked. (R. 28-29)

> "It is not true that the defendant Poret was denied an opportunity to file his motion timely. He was indicted on December 11, 1950, and had until March 8, 1951, a period of almost three months, in which to file his motion to quash. His own actions to avoid prosecution caused him not to avail himself of his right to challenge the jury. During the time he could have filed the motion he was a fugitive by his own choice and will. If we concede that his flight made it impossible for him to file the motion timely, he himself brought about the situation which made it impossible. To our minds it would be improper to hold that the prescriptive period provided in the statute is applicable to an accused held under arrest within the jurisdiction of the court but is not applicable to an accused who of his own will and accord has absconded to avoid prosecution. Such a holding would be tantamount to rewarding the absconding person for his flight. Moreover, the article provides for a prescriptive period which runs against the accused, and he cannot by any acts of his own extend the time provided for the filing of the motion.
>
> "Defendant cites and relies on the case of

Carter v. Texas, 177 U.S. 422, 20 S. Ct. 687, 688, 44 L. Ed. 389. . . . The Supreme Court of the United States reversed his conviction and remanded the case, concluding that the defendant had been denied a right claimed by him under the Constitution of the United States. In doing so the court pointed out that the grand jury which indicted the defendant had been empanelled before the commission of the offense for which he was indicted, and that under this article he therefore never had an opportunity to challenge the array of the grand jury.

"We might observe that under the quoted Texas article no person indicted would ever have an opportunity after indictment to challenge the array of the grand jury which indicted him. This is not true under our article, and, as we have hereinabove pointed out, the defendant in the instant case was not denied an opportunity to file his motion to quash and have it considered by the court, but his failure to avail himself of this opportunity was caused by his flight. Under the circumstances of this case the case cited and relied on is not pertinent or controlling.

"We conclude therefore that under the facts of the instant case application of Article 202 to this defendant does not deprive him of the equal protection of the law and due process as guaranteed by the Constitutions of this state and the United States." *(State v. Labat*, 226 La. 201, 214-217, 75 S. (2d) 333 (1954).

Thus the Louisiana Supreme Court has placed its interpretation on Article 202 and has announced the principle that the limitation provided therein runs against a fugitive. Under the well-recognized principle already discussed, this Court should accept the Louisiana Supreme Court's interpretation of the Louisiana Statute.

There is no suggestion that the interpretation of the Louisiana Supreme Court in this respect is unreasonable, nor could any such suggestion be made. If a defendant could extend the time within which he could attack the grand jury by his own unlawful flight, he could completely thwart the purpose of Article 202, which is to give the State an opportunity at an early date while the proof is still available to justify the composition of its grand jury. If a defendant were successful in eluding arrest for an extended period, it might well be impossible for the State to produce the required proof. Thus by his unlawful flight a defendant would escape prosecution completely.

It is fundamental that a fugitive from justice cannot claim the benefit of a statute of limitations barring criminal prosecution after a certain period of time. (See 18 U.S.C.A. 3290) It is equally logical to deny a fugitive a reward by reason of his unlawful flight with respect to a statute which limits the time within which he can file technical pleadings.

VI.

Petitioner Labat was represented by effective counsel.

About two months before the expiration of the grand jury term, the Court appointed E. I. Mahoney, Esq., as counsel to represent petitioner Labat. (R. 1). About a year later, Mahoney withdrew as counsel, Labat being represented by his own counsel. (R. 1, 36). No attack upon the grand jury was filed until about a year and eight months after the end of the term of the grand jury, or nearly ten months after Labat secured the services of his own counsel. (R. 3).

Counsel for Labat contend in brief that he was denied due process because he was not represented by effective counsel during the period provided by Article 202 for filing an attack upon the grand jury.

It has been held that there is a presumption that appointed counsel is competent: *Feeley v. Ragen*, 166 F. 2d 976 (7th Cir. 1948); Cf. *Walker v. United States*, 218 F. 2d 80 (7th Cir. 1955). This presumption should be unusually strong in the instant case in view of a Louisiana statutory requirement that in capital cases appointed counsel must have "at least five years' actual experience at the bar". (La. R.S. 15:143).

Federal courts have been properly reluctant to set aside verdicts on the ground that the attorney

appointed to represent the accused was so incompetent that the accused did not have a fair trial. Thus in *United States v. Wight*, 176 F. 2d 376 (2nd Cir. 1949), the court said that "a lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice."

In the instant case, there is absolutely nothing to indicate that the appointment of Mr. Mahoney did not furnish Labat with effective counsel. As a matter of fact, the only portion of the record which treats Mahoney's qualifications is the following comment by the Louisiana Supreme Court:

> "The defendant Labat, who was arrested and imprisoned shortly after the commission of the crime, was represented by able, learned, and experienced counsel appointed by the court to represent him on January 5, 1951." R. 27. (For further evidence that Mr. Mahoney was eminently qualified, able and conscientious, see Appendix to this brief.)

It is suggested in Labat's brief that the mere fact that Mr. Mahoney did not timely file an attack upon the grand jury is proof that Labat lacked effective counsel. Actually, the fact that Mr. Mahoney did not file such an attack can be as significant of sagacity and strategy as of anything else. Mahoney may have determined that such an attack would be in vain, since he may have known as a

fact that there had been no systematic exclusion. Or perhaps, faced as he was with the overwhelming evidence which he knew the state would produce, and knowing that if the grand jury was in fact improperly empanelled a timely attack would result in an immediate indictment from a new grand jury, Mahoney may have decided to file his attack upon the grand jury after the time provided had expired, proceed to trial before a petit jury with the hope of saving Labat from a capital verdict, and, if unsuccessful, attempt to secure for him a second trial by appeal to this Court.

The State of Louisiana has been unable to find a single case in which any court has held that appointed counsel was inadequate simply because he did not file a particular pleading within a particular period. If the failure to file a timely attack upon the grand jury is evidence of inadequacy of counsel, then no limitation of any kind in a procedural statute would ever be effective. Whenever the limitation was not complied with, the result would be a finding that the defendant was not properly represented by counsel, thus relieving the defendant of the effect of the limitation. Obviously, this position is untenable.

CONCLUSION

It is respectfully submitted that this Honorable Court does not have jurisdiction in this case, the decision of the Louisiana Supreme Court being

based on an adequate non-federal ground *(State v. Wilson, supra)*; that the writ in this case should therefore be declared to have been improvidently granted; and that the judgment of the Louisiana Supreme Court should be affirmed.

FRED S. LeBLANC,
Attorney General.
MICHAEL E. CULLIGAN,
Assistant Attorney General.
LEON D. HUBERT, JR.,
District Attorney.
ADRIAN G. DUPLANTIER,
First Asst. District Attorney.

CERTIFICATE

This is to certify that a copy of this brief has this day been delivered to the Hon. Rudolph F. Becker, Jr., Maritime Bldg., New Orleans, Louisiana, Attorney for Clifton Poret, and the Hon. Felicien Y. Lozes, American Bank Bldg., New Orleans, Louisiana, Attorney for Edgar Labat, by depositing the same and addressing to him, as aforesaid, in the United States mail at New Orleans, Louisiana.

New Orleans, Louisiana, this_____day of September, 1955.

_____
Assistant Attorney General

APPENDIX

New Orleans States June 1, 1955

LEGAL PROFESSION HONORS ATTY. EDWIN I. MAHONEY

The legal profession honored one of its oldest and most respected members today.

Veteran attorney Edwin I. Mahoney was eulogized as an "astute and honored criminal lawyer" in a ceremony in Judge Frank T. Echezabal's section of criminal district court.

A plaque honoring Mahoney was presented by Mrs. Dorothy T. Horton, president of the Criminal Courts Bar Association.

Judges of the criminal court sat en banc during the ceremony.

Mahoney, a former state legislator, has been practicing law for 52 years in all of the city and state courts.

The plaque read:

". . . . an astute and honored criminal lawyer who has ever been mindful of the oath administered him 52 years ago to uphold the law and to guarantee to each accused his day in court."

The courtroom was filled with members of the judiciary from the municipal civil and federal courts, members of the district attorney's and U.S. attorney's office, the criminal sheriff's office, criminal district court attaches, and members of his family.

Speakers included Judges Echezabal, George P. Platt, Fred W. Oser, Bernard J. Cocke, Niels F. Hertz and J. Cleveland Fruge, Judge William J. O'Hara could not be present and his greeting was read by Mrs. Horton.

Robert LeCorgne, Secretary of the state bar association, also spoke briefly for the lawyers of the state.

Presiding over the ceremony was Charles Byrne, an attorney.